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In the Supreme Court of the United States

OCTOBER TERM, 1987

EVERETT PAUL NEELEY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether Use Of A Federal Evidentiary Rule Concerning The Basis For Expert Opinions To Interject Inadmissible Hearsay In Violation Of A Defendant's Sixth Amendment Right To Confrontation Of Witnesses Can Be Deemed Harmless Error When The Testimony Concerns An Ultimate Issue In Controversy?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Petitioner, Everett Paul Neeley ("Neeley"), presently serving a sentence of life imprisonment at the Disciplinary Barracks at Fort Leavenworth, Kansas, petitions this Court for a writ of certiorari to review the affirmance of his conviction and sentence by the United States Court of Military Appeals.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals affirming Neeley's conviction and sentence is reported at *Neeley v. United States*, 25 M.J. 105 (CMA 1987). A copy of the opinion is included in the Appendix. The prior opinion of the United States Air Force Court of Military Review is reported at *Neeley v. United States*, 21 M.J. 606 (A.F.C.M.R.1986) and is also included in the Appendix.

JURISDICTION

The opinion of the United States Court of Military Appeals, rendered after a decision by that Court to grant re-

view of the issues presented here, was rendered on Septembesr 28, 1987. This Court has jurisdiction to hear this case pursuant to the judicial code. 28 U.S.C. § 1259(1). This section of the judicial code vests jurisdiction in this Court to review decisions of the Court of Military Appeals that were rendered under 10 U.S.C. § 867(b)(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right. . .to be confronted with the witnesses against him. . . .

Military Rule of Evidence 703 (identical to F.R.E. 703):

> The facts or data in the particular case upon which an expert bases an opinion may be those perceived by or made known to the expert, at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

STATEMENT OF THE CASE

Neeley was convicted by a general courts-martial of premeditated murder, and other offenses, in violation of certain provisions of the Uniform Code of Military Justice ("UCMJ"). 10 U.S.C. §§ 890;918;928;934. The evidence at trial showed that Neeley and his victim—Gerri Harris—were both serving as stewards in a mess hall at the Little Rock Air Force Base near Little Rock, Arkansas, from 1984-1985. Neeley is black and Harris is white.

A romance developed between the two and, after dating for a period of time, they moved into a trailer together. After a time the relationship deteriorated and in January, 1985, Harris told Neeley that she was going to leave him.

Neeley seemed at first to accept the break-up. After talking with Harris about the situation, he persuaded her to accompany him back to the trailer to retrieve the rest of her belongings. Upon arrival at the trailer, Harris discovered that Neeley had destroyed most of her possessions. As she started to leave Neeley confronted her and began beating her with his fists. Only after she swore that she loved him did he let her get up and go to an adjoining trailer to obtain a ride back to the base.

Harris reported the incident to her supervisors. As a result Neeley's commanding officer—Lt.Colonel John Grainger—gave Neeley a direct order to leave Harris alone. Despite the order, Neeley immediately attempted to talk to Harris in the mess hall where they worked, but was rebuffed by her co-workers. Because of this direct violation of an order Neeley was ordered to undergo a psychological examination. A psychiatric social worker—Major David Moyers—administered a series of psychometric tests to Neeley and interviewed him at the hospital. The tests indicated that Neeley was under a great deal of pressure. Moyers prescribed sedatives and after two days of hospital rest, Neeley was released. However, Moyers was so alarmed by the test results that he phoned Lt. Col. Grainger to tell him that Neeley's results mirrored those of an airman that had gone beserk and committed a homicide/suicide in Alaska a year or two earlier.

Neeley was again ordered to stay away from Harris. Harris, in the meantime, was almost daily informing her supervisors and friends that she was afraid of Neeley. Yet, on at least two different occassions she had three hour conversations with Neeley about the future of his life. She also pressed courts-martial charges against him for the beating.

During this entire period of time Neeley attempted suicide on at least one occasion. He attempted to get away from the air base through several different channels. He

also sought guidance and counseling from a base chaplain. At the same time, he was making repeated attempts to reconcile with Harris.

On February 6, 1987, he was formally charged under the UCMJ with violating a lawful order of a commanding officer, and with battery. After discussing possible defenses with Area Defense Counsel David Minor—essentially the Air Force public defender—he returned to his trailer.

The next morning at approximately 5:00 a.m. he walked into the mess hall where Harris was working. He passed several employees without speaking and continued into the back part of the kitchen where Harris was cleaning up. He then shot her five or six times with a .45 caliber pistol. Harris died almost immediately.

Neeley then called the base law enforcement officers and awaited their arrival. He complied with all of their requests. Upon being taken to base police station he made the first of three inculpatory statements that he would give despite the fact his counsel was attempting to get in to meet with him.

Neeley also consented to a search of his automobile and the trailer. Numerous items of evidence were recovered at these locations.

Because a charge of premeditated murder was contemplated, Neeley was sent to Wilford Hall Air Force Regional Medical Center at Lackland Air Force Base, Texas, for psychiatric evaluation. Three psychiatrists interviewed him as a part of a sanity board. He was also administered another set of psychometric tests which were evaluated by clinical psychologist, Capt. Nancy Slicner.

Capt. Slicner's report found that the test results were valid; that Neeley was under a great deal of stress; that he displayed marked paranoid features. Despite the evaluation of certain scales on the tests which could indicate malingering, Slicner felt the test was an accurate depiction of Neeley's psychological make-up.

This report was delivered to the Sanity Board comprised in part of Lt. Colonel Thomas Martin and Lt. Col. Frank Carpenter. Although these doctors did not discover in their interviews of Neeley the various psychological stressors suggested by Slicner, they failed to interview Neeley again. Neeley was found to be sane at the time of the Sanity Board and at the time of the offense.

Neeley's defense counsel interposed a defense of mental disease or defect. To sustain the proof on these charges two forensic clinical psychologists were hired to test and interview Neeley. Dr. Daniel Donahue and Dr. David Pritchard were both on the staff of the Arkansas State Hospital where they conducted sanity evaluations on persons charged with state crimes.

Drs. Donahue and Pritchard were impressed by the fact that Neeley's psychometric tests before, immediately after, and several months after the crime were all consistent. The graphs of these charts were amazingly similar. In addition, Dr. Pritchard administered the Millon Clinical Multiphasic Inventory ("MCMI") to Neeley and found both consistency with other tests, and that the tests results were statistically valid.

This information combined with interview information from the Sanity Board, their own interviews, and extensive family history, led them to conclude that there was a reasonable doubt as to Neeley's sanity at the time of the offense. The specific diagnosis was that Neeley suffered from a major depressive episode with psychotic features.

The entire defense at trial was built around this defense. A crucial aspect of this defense was the consistency of all the psychometric tests before and after the offenses. Further, Neeley made a major aspect of his presentation the failure of Drs. Martin and Carpenter to re-interview him when they failed to notice the psychological factors discussed in Slicner's report.

After presenting this evidence at trial, the Government called Slicner as a part of its rebuttal case. Slicner testified that all of the tests administered to Neeley were found to be within the validity scales of the tests. She then stated that after learning she was going to be a witness in the case she showed the psychometric test she did to six psychologists at Wilford Hall. Over Neeley's timely objection she was permitted to state that it was the opinion of theses unnamed, unknown, psychologists that the Wilford Hall tests results were intentionally inflated. In other words, Neeley had faked the results.

She was later permitted to testify that she had been told by the director of forensic services at Wilford Hall that the MCMI did not have validity scales, and that nothing was known about the test. This testimony completely undermined the foundation for Neeley's insanity defense. The military judge overruled Neeley's hearsay and confrontation objections opining that this evidence was admissible under M.R.E. 703. This rule permits experts to base their opinions on the data and materials compiled by other experts.

The United States Air Force Court of Military Review found this ruling to be erroneous, but stated that it was harmless error. The Court of Military Appeals affirmed after subjecting it to a relevancy test.

Neeley seeks review from this Court to determine whether the introduction of testimony on an ultimate issue in the case in violation of his Sixth Amendment rights of Confrontation can be subjected to an harmless error analysis. Since M.R.E. 703—the rule upon which the introduction of the evidence was based—is exactly the same as F.R.E. 703, Neeley suggests that the opinion in this case has far reaching impact on both the military and civilian judicial systems.

REASONS FOR GRANTING THE WRIT

The Court should review this case and determine whether the admission of evidence on a critical fact in dispute – that has not otherwise been admitted by the defendant – in violation of the defendant's Sixth Amendment right to confront adverse witnesses is subject to the harmless error analysis set forth in *Chapman v. California, 386 U.S. 18 (1967).*

There is no more fundamental right of an accused than the Sixth Amendment right to confront the accusers and subject their testimony to cross examination. The right to confront and cross-examine adverse witnesses is such an essential and fundamental right that the denial of this right, without a waiver, is a constitutional error of the first magnitude. *Ohio v. Roberts*, 448 U.S. 56 (1980); *Brookhart v. Janis*, 384 U.S 1 (1966); *Alford v. United States*, 282 U.S. 687 (1931). This right is applicable in military cases as well as civilian cases. *United States v. Hines*, 23 M.J. 125 (CMA 1986).

The question presented here is whether a harmless error analysis applies when the denial of confrontation is on a critical fact in dispute, particularly when that fact has not been previously admitted by the defendant. This Court has never ruled that denial of a defendant's right to confront an adverse witness' conclusion about a totally disputed fact is subject to harmless error analysis. This question, distinguishing this case from recent confrontation cases, is reason to grant the writ.

This case involves a situation in which a testifying expert witness – who had changed her opinion upon learning she would be a witness at trial – was permitted to express the opinions of five or six non-testifying experts as to: (1) the validity of Neeley's psychometric test results; (2) the veracity of one of Neeley's expert witnesses concerning a particular psychometric tool. These opinions were used to

bolster the witness' changed opinion. The testimony was presented after both of Neeley's expert witnesses had testified that the validity of these tests was an extemely important factor in their conclusion about his mental condition. The effect, then, was to undercut two critical factors to Neeley's defense.

The case directly addresses the extent to which M.R.E. 703 (which is identical to F.R.E. 703), can be a basis for violating a defendant's confrontation rights in a criminal trial setting. The Court of Military Appeals opinion is one of the few cases that has addressed the proper scope of these rules. To what extent an expert can testify about the opinions of other experts without violating a defendant's Sixth Amendment rights is a question that has received conflicting answers by the courts that have considered it. Because of the identical language in the two rules, the Neeley decision may be relied upon by the civilian courts; thus, the precedent has far reaching implications.

This Court should grant the petition and review this matter on the merits. The Court should take this opportunity to determine whether an accused's right to confront witnesses can be violated under the guise of an evidentiary rule.

1. This Court has long recognized that the Sixth Amendment permits a criminal defendant to be confronted with the witnesses against him. The essential purpose of this right is to provide the defendant "the opportunity of cross examination." *Davis v. Alaska*, 415 U.S. 308, 315 (1974).

This guarantee of cross examination is limited. The limitation is merely that the defendant be provided an opportunity for *effective* cross examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 677, 106 S.Ct. 1431, 1435 (1986). A defendant is not permitted an unfettered opportunity to explore every conceivable factor that may lead a jury to question the integrity of a particular witness. *Id.*

However, if a defendant's right of confrontation is violated, constitutional error occurs. The prejudicial nature of this error is more evident if the case involves the improper admission of evidence as opposed to the improper exclusion of evidence. *Compare, Tennessee v. Street*, 471 U.S. 409, 105 S.Ct. 2078 (1985); *Ohio v. Roberts; Delaware v. Fensterer*, 474 U.S. 15, 106 S.Ct. 292 (1985).

This Court has concluded that in particular fact situations the admission of evidence in violation of a confrontation right may be subject to a harmless error analysis. *Harrington v. California*, 395 U.S. 250, 254 (1969). Further, the Court has ruled that the improper exclusion of evidence may be subjected to harmless error analysis. *Delaware v. Van Arsdall.* But, the Court has never ruled that the admission of evidence on a critical fact in dispute in violation of a defendant's Sixth Amendment rights to confrontation may be subjected to harmless error analysis. It is on this point that this case turns.

This case is readily distinguishable from *Harrington*. There the error was prohibiting the defendant from confronting through cross examination co-defendants whose statements had been admitted against him in violation of the rule in *Bruton v. United States*, 391 U.S. 123 (1968). At first blush this would appear to be *per se* prejudical error mandating reversal. However, the facts of the case showed that the error was properly subjected to harmless error analysis because the defendant had admitted in open court that he was present at the crime scene. In other words, he had admitted the thrust of the evidence against him contained in the statements of the non-testifying co-defendants.

Here just the opposite has occurred. Neeley raised a defense of mental disease or defect. A significant portion of the proof that he was suffering from mental disease or defect at the time the crime was committed was based on

the validity of his test results on certain psychometric tests. This validity was not only founded internally within the results of three Minnesota Multiphasic Personality Inventories ("MMPI") that he took before and after the offense, but also on the validity scales on the MCMI.

Government witness Nancy Slicner initially agreed that the MMPI administered to Neeley at Wilford Hall was valid. Only when she learned she was going to testify did she change her opinion. Only then did she show the test to the non-testifying psychologists, and then she offered their consensus opinion that Neeley's MMPI was invalid.

Since the three MMPI's administered to Neeley before and after the offense were so strikingly similar, discrediting one would discredit all three. Likewise, the opinions of Drs. Donahue and Pritchard—Neeley's experts—would, by their own admission, be different if the MMPI's were determined to be invalid.

Slicner also provided evidence from a non-testifying psychologist that the MCMI—relied upon by Dr. Pritchard because of its unique internal validity scales—did not have validity scales. Thus, a witness that Neeley had no opportunity to confront was permitted, through Slicner, to testify that Neeley's expert was lying. Since Dr. Pritchard had testified forcefully that the validity scale of the MCMI helped provide substantial comfort to his diagnosis, discrediting this testimony effectively discredited all of Dr. Pritchard's analysis.

The key is that unlike *Harrington*, or any other case from this Court, evidence from non-testifying witnesses was admitted on the only critical fact in dispute—i.e., Neeley's legal responsibility at the time the offense was committed. This Court should grant the petition and rule that denial of the opportunity to confront adverse witnesses is not subject to harmless error analysis if that evidence concerns a critical fact in dispute. In such situa-

tions, violations of the defendant's confrontation rights are *per se* prejudicial and reversal is mandated.

2. A second reason for granting the writ is to determine if hearsay evidence, which violates an accused's confrontation rights, may be smuggled in through the use of Rule 703. In this case M.R.E. 703 is at issue. However, since this rule is identical to F.R.E. 703, and U.R.E. 703, the impact of the Neeley opinion transcends the military judicial system. The courts that have considered the scope of this rule are in disagreement. In *Reardon v. Manson*, 617 F.Supp. 932 (D.Conn. 1985) a petition for writ of habeas corpus was granted because the defendant's conviction was obtained through testimony of one expert relying upon the opinions of other experts as to whether certain evidence was a controlled substance. The federal court concluded that a defendant had an absolute right to confront the witnesses making opinions on this ultimate issue to determine their qualifications and bases for the opinions.

Similarly in *O'Kelley v. State*, 607 P.2d 612 (1980), a conviction was reversed because the testimony of a non-testifying psychiatrist was offered under the guise of New Mexico Evidence Rule 703 (which is identical to M.R.E. 703). The New Mexico court reasoned that Rule 703 applies to the information gained from others, but it does not permit an expert to smuggle in hearsay by stating the opinions of others.

However, the Seventh Circuit has permitted hearsay opinions of others to be presented through expert witnesses under F.R.E. 703. *United States v. Lawson*, 653 F.2d 299 (1981). *See also United States v. Affleck*, 776 F.2d 1451 (10th Cir. 1985); *United States v. Soulard*, 730 F.2d 1292 (9th Cir. 1984). There is some confusion in these opinions as to the basis for the admission of the testimony. There is also a question as to whether the defendant had access to the non-testifying witnesses. These cases are also

unclear as to whether the evidence was a direct statement of the witnesses' opinions as in this case.

The key, though, is that there is confusion in the various courts that are addressing the tension between Rule 703 and a defendant's right to confront his accusers. This court should grant the writ to resolve this tension. Neeley submits that the Court should determine that in criminal cases evidence submitted on critical facts in dispute must come from witnesses subject to cross examination. The evidence must not, as here, be smuggled in under the guise of Rule 703.

CONCLUSION

Rule 703 was intended to make it easier for experts to provide testimony that would assist a factfinder in reviewing evidence for which specialized knowledge is required. In this case the rule was used to provide the factfinder with the opinions of non-testifying experts on the ultimate issue in dispute. Such use of the rule is improper because it denies the criminal defendant the fundamental right to confront adverse witnesses and subject their opinions to cross examination. Some courts have prohibited such use of Rule 703, while others have permitted such use. This Court should grant the writ and determine whether Rule 703 can be used in violation of an accused's Sixth Amendment right to confront witnesses. If not, the Court should then determine whether the improper use of Rule 703 can

be subjected to a harmless error analysis when the admitted evidence addresses a critical fact in dispute.

Respectfully submitted,

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APPENDICES

UNITED STATES COURT OF MILITARY APPEALS.

No. 54,317/AF
ACM 24645

UNITED STATES, APPELLEE

v.

ERNEST P. NEELEY, SENIOR AIRMAN
U.S. AIR FORCE, APPELLANT

September 28, 1987

COUNSEL

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For Appellee: *Major Kathryn I. Taylor* (argued); *Colonel Kenneth R. Rengert* and *Lieutenant Colonel Donal F. Hartman, Jr.* (on brief); *Colonel Joe R. Lamport* and *Lieutenant Colonel Robert E. Giovagnoni.*

OPINION OF THE COURT

COX, Judge:

Contrary to his pleas, appellant was convicted of premeditated murder and other offenses, in violation of Articles 118, 128, 134, and 90, Uniform Code of Military Justice, 10 U.S.C. §§ 918, 928, 934, and 890, respectively. He was sentenced to a dishonorable discharge, confinement for life, reduction to E-1, and total forfeitures. The convening authority approved these results, and the Court

of Military Review affirmed. 21 M.J. 606 (1985). We granted review to consider:

> WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF THE ACCUSED WHEN HE ADMITTED INTO EVIDENCE, OVER DEFENSE OBJECTION, THE OPINIONS OF FIVE PSYCHOLOGISTS THAT THE ACCUSED HAD INTENTIONALLY INFLATED THE RESULT OF HIS PSYCHOLOGICAL TEST, SUCH OPINIONS BEING INADMISSIBLE HEARSAY, AND SUCH A RULING BY THE JUDGE DENYING THE ACCUSED HIS RIGHT TO CROSS-EXAMINE AND CONFRONT THE PSYCHOLOGISTS CONCERNING THEIR OPINIONS.

The issue was raised in the following factual context. Appellant and the victim lived together in an off-base trailer. He assaulted and battered the victim by hitting her about the face and head, and, when she informed him that she was moving back to her barracks, he threatened to kill her. His commanding officer was informed of the incident and ordered the appellant to stay away from the victim. Later, in defiance of the order, appellant went to the dining facility where she worked and shot her seven times with a .45-caliber pistol, killing her.

Appellant contested his legal responsibility for the homocide on the basis that he was not mentally competent. In support of this defense, he called two clinical psychologists who asserted that, although appellant was competent to stand trial, he was "more likely than not . . . unable to conform his behavior to the intent of the law." When they evaluated appellant's mental condition, both psychologists had available for their consideration the test results of three Minnesota Multiphasic Personality Inventories (MMPI). One of the tests had been administered after the assault upon the victim but before she was killed.

In rebuttal, the Government called three psychiatrists who testified that appellant was mentally responsible for the offenses in terms of the appropriate legal standard. *See United States v. Frederick*, 3 M.J. 230 (C.M.A. 1977).

It was in the presentation of the Government's case regarding appellant's sanity that the evidence giving rise to the granted issue was presented by trial counsel. The Government called as its witness a clinical psychologist who had reviewed the results of several psychological tests administered to appellant. In this witness' opinion, appellant had intentionally attempted to establish the existence of a psychological condition that did not exist. She further testified over defense objection that she had shown the test results to other psychologists, and she was allowed to state on the record that it "was the consensus among these people when" they were shown the profile "[t]he it was intentionally inflated."

The Court of Military Review found that, although Mil.R.Evid. 703, Manual for Courts-Martial, United States, 1969 (Revised edition), permits psychologists to rely on the opinions of others, the military judge erred by allowing her to express those other opinions. However, the court ruled that appellant had not been prejudiced by this action. 21 M.J. at 608-09.

Recently, we had occasion to discuss the problem of smuggling hearsay statements into evidence under the guise of an expert witness relying on the hearsay to form an opinon. *United States v. Stark*, 24 M.J. 381, 384 (C.M.A. 1987). Indeed, as recognized by Chief Judge Hodgson, *citing* the editorial comment of S.Saltzburg, L.Schinasi, & D.Schlueter, *Military Rules of Evidence Manual* 596 (2d ed. 1986), that "unless care is taken in utilizing Rule 703, parties can 'smuggle' much hearsay evidence into a case, when such evidence is not properly

admitted for its truth." *See United States v. Neeley, supra* at 608. As we noted in *Stark*, the problem is the admission into evidence of statements that are clearly hearsay under the guise that they are not being offered for " 'the truth of the matter asserted.' " 24 M.J. at 384.

As recommended by Saltzburg, Schinasi, & Schlueter, we concluded in *Stark* that Mil.R.Evid. 403 provides an appropriate vehicle for use by the military judge in resolving the admissibility of this type of hearsay evidence. *Id.* We, therefore, reject the black-letter test suggested by Chief Judge Hodgson that "[w]hat must be remembered is that while expert witnesses may rely on hearsay under Rule 703 to form their opinion, the hearsay itself is not admissible." *United States v. Neeley, supra* at 608, *citing United States v. Ramos*, 725 F.2d 1322 (11th Cir. 1984); *Coulter v. Stewart*, 642 P.2d 602 (N.M. 1982); and *State v. Towne*, 453 A.2d 1133 (Vt. 1982).

We recognize that our disagreement with the court below may be only one of semantics because a statement is not hearsay by definition unless it is "offered in evidence to prove the truth of the matter asserted." Mil.R.Evid. 801(c). We simply believe that the distinction between testimony that is offered 1) for the truth of the matter or 2) to prove the underlying basis for an expert opinion is a line too fine to draw. Mil.R.Evid. 403 is a better vehicle to use in resolving the conflict.

However, Mil.R.Evid 401 should not be overlooked in trying to resolve admissibility of evidence under Mil.R.Evid. 703. Is the proffered evidence *relevant*? What does the evidence tend to prove or disprove about the case? What is the "fact . . . of consequence" that is being established?

The instant case offers us a classic example. What is the "fact . . . of consequence" to be proved by the question to the psychologist? If the Government is trying to prove, by offering the hearsay opinions of other psychologists, that

appellant intentionally inflated the results of his tests, then the evidence is clearly hearsay and not admissible.

If, on the other hand, the Government is seeking to prove that its expert psychologist had a *basis* for her opinion and that experts in her field "reasonably relied upon" the opinions of other psychologists "in forming opinions or inferences," then the evidence was being offered to prove that the witness had a basis for her own expert opinion. And although "the truth of the matter asserted" is *smuggled* into evidence, the only true evidence that appellant inflated the test results came from the witness on the stand.

The real question is, therefore: Does the danger of unfair prejudice created by the testimony outweigh its probative value? In this regard, we agree with the court below that there was "no reasonable likelihood" that admission of the evidence "affected the judgment of the triers of fact." *United States v. Neeley, supra* at 609.

We do believe, however, that the military judge should give a limiting instruction concerning the appropriate use of this type of testimony. *Id.* at 608 n.3. *See United States v. Affleck*, 776 F.2d 1451 (10th Cir. 1985); *United States v. Sims*, 514 F.2d 147, 149-50 (9th Cir.), *cert. denied*, 423 U.S. 845 (1975) (when "such evidence" is admitted, it "becomes necessary for the court to" give a limiting instruction to the jury). However, failure to do so here does not constitute plain error. *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986); Mil.R.Evid. 105 (upon proper request, limiting instructions shall be given).

The psychologist's testimony related primarily to her own opinion concerning the test results in question. The prosecution did not emphasize the opinions of the other psychologists during appellant's fairly lengthy trial. Furthermore, three psychiatrists, two of whom participated in the sanity board that examined appellant, unequivocally testified that appellant was criminally responsible for the offenses in question, while the defense psychologists ex-

pressed their opinions in terms of "more likely than not." Given the entire record, the danger of unfair prejudice was inconsequential.

We also have examined the entire record of trial and find no "error [which] materially prejudice[d] the substantial rights of the accused." Art. 59(a), UCMJ, 10 U.S.C. § 859(a).

The decisions of the United States Air Force Court of Military Review is affirmed.

Judge SULLIVAN concurs.

EVERETT, Chief Judge (concurring in the result):

I fully agree with Chief Judge Hodgson's opinion in this case in the court below. 21 M.J. 606 (1985).

As is becoming increasingly apparent, the liberal treatment of expert testimony under the Federal Rules of Evidence and the Military Rules of Evidence has become an invitation to evade the hearsay prohibition and the defendant's right of confrontation. The present case is a perfect example of this phenomenon.

The defense offered the testimony of two psychologists with eminent qualifications. Their conclusion that appellant had been "in a psychotic state" at the time of the homicide was based in part on psychological tests that had been administered to Neeley. These included the Minnesota Multiphasic Personality Inventory (MMPI) test, which had been administered to Neeley shortly before he killed his girlfriend and which also had been administered after that slaying. In rebuttal, the Government called various witnesses, including Captain Nancy Slicner, a psychologist serving on active duty. She had never interviewed Neeley but had analyzed the MMPI test results. Although she originally had concluded that the tests were "valid" and indicated a thought disorder—a conclusion she had communicated to the sanity board—her view at the time of trial was that Neeley had "over-endorsed" certain behavior—that is, that he had been faking.

To bolster her testimony, Captain Slicner explained that she had reviewed the test results with five other psychologists. When trial counsel asked her about a "consensus" among the psychologists, defense counsel properly objected. Nonetheless, the witness was allowed to reply that these other psychologists believed the profile had been "intentionally inflated" and so was an unreliable basis for forming an opinion as to appellant's sanity.

As the Court of Military Review perceived, such testimony goes far beyond the leeway conferred by Mil.R.Evid. 703. That Rule purports to embrace only "facts or data"—terms which at first glance would not seem to include opinions of third persons. However, Mil.R.Evid. 703 is identical to Fed.R.Evid. 703, as to which the Advisory Committee's Note specifically states:

> Thus, a physician in his own practice bases his diagnoses on information from numerous sources and of considerable variety, *including* statements by patients and relatives, reports and *opinions from nurses, technicians and other doctors*, hospital records, and X rays.

See S. Saltzburg and K. Redden, *Federal Rules of Evidence Manual* 687 (4th ed. 1986). (Emphasis added.)

Although Mil.R.Evid. 703 apparently was intended to allow an expert to base his opinion—at least, in part—on the opnions of other experts, and although Mil.R.Evid. 705 allows an expert to give the reasons for his opinion, I still am unconvinced that, on direct examination and over objection, an expert may go as far as did Captain Slicner. Although an expert should be allowed to testify that he has consulted other experts and considered their opinions in formulating his own conclusion, the specifics of the other experts' opinions cannot be elicited on direct examination, if the hearsay prohibition is to be respected.

If the opposing party wishes to bring to the attention of the factfinder any details about opinions that were relied

on by an expert witness, he can do so on cross-examination. Moreover, if those details are introduced in evidence, the military judge should give a limiting instruction pointing out that this evidence can be utilized only for evaluating whether an adequate basis existed for the opinion of the witness who was tesifying in court. Such an approach will eliminate the possibility of unfairness to an accused without unduly limiting the prosecutor in his presentation of relevant evidence.

Although the evidence to which the defense objected should have been excluded, I, too, am convinced by the record that it was not material in procuring appellant's conviction. Therefore, I join in affirming the court below.

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

ACM 24645

UNITED STATES

v.

SENIOR AIRMAN EVERETT P. NEELEY, FR 535-82-1310
UNITED STATES AIR FORCE

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5 NOVEMBER 1985

Sentence adjudged 16 July 1984 by GCM convened at Little Rock Air Force Base, Arkansas. Military Judge: Barton L. Spillman.

Approved sentence: Dishonorable discharge, confinement at hard labor for life, forfeiture of all pay and allowances and reduction to airman basic.

Appellate Counsel for the Accused: Mr. Thomas M. Carpenter and Mr. Charles L. Carpenter, Jr., Little Rock, Arkansas; Colonel Leo L. Sergi, and Lieutenant Colonel Michael D. Wims. Appellate Counsel for the United States: Colonel Kenneth R. Rengert, Colonel Andrew J. Adams, Jr., and Lieutenant Colonel Donal F. Hartman, Jr.

Before

HODGSON, FORAY and MICHALSKI
Appellate Military Judges

DECISION

HODGSON, Chief Judge:

The events that led to the offenses before us are not in dispute. From all accounts the appellant and Airman First Class Harris, who lived together in an off-base residence, enjoyed a bittersweet relationship which began deteriorating in the fall of 1983. On 11 January 1984, she told the appellant that their arrangement was not working out and she no longer wished to live with him and was moving back to the barracks. The next day, the appellant beat Harris badly about the face and head and threatened to kill her if she left him. He stopped hitting her only after she agreed to stay with him and not report the assault. To the contrary, she told her commander of the incident who interviewed the appellant and ordered him to stay away from her. Subsequently, on 6 February charges were preferred against the appellant for assault and communicating a threat. On 7 February, he went to the dining facility on Little Rock Air Force Base where harris worked and shot her five times in the head, neck and chest at point blank range with a .45 caliber pistol he had purchased three days before.

The circumstances just described resulted in a premeditated murder conviction together with various lesser offenses.[1] The approved sentence extends to a dishonorable discharge, life imprisonment, total forfeitures and reduction to airman basic.

I

Early in the proceedings individual defense counsel conceded that his client killed Harris, but argued that this of-

[1] Additionally, the appellant was convicted of assault and battery, communicating a threat, disobeying an order to stay away from Airman Harris, and retaliating against a federal witness by causing bodily harm to Airman Harris in violation of 18 U.S.C. 1513.

fense along with the lesser charges were the result of a mental condition that made the appellant not accountable for his actions. To support the existence of a mental state showing a lack of substantial capacity for the appellant to conform his conduct to the requirements of law, the defense offered the testimony of Doctor Dane Donahue and Doctor David A. Pritchard, two well qualified psychologists. Both individuals diagnosed the appellant as suffering from a "major depressive episode with psychotic features." Both agreed that it is more likely than not the appellant was unable to conform his behavior to the intent of the law. Further, Doctor Pritchard and Doctor Donahue were of the view that a person could be in a psychotic state and yet appear very normal. It was their conclusion that the appellant's girlfriend's decision to terminate their interracial relationship, and the appellant's feeling that the break-up was caused by racial bias, triggered a "major depressive episode" that culminated in the killing.

In rebuttal, the Government tendered the testimony of three psychiatrists two of whom, Lieutenant Colonel (Doctor) Frank Carpenter and Lieutenant Colonel (Doctor) Thomas A. Martin III, were members of the appellant's sanity board that met on 27 February 1984. Doctor Carpenter is the Director of Psychiatric Residency Training at Wilford Hall Medical Center, Lackland Air Force Base, Texas; Doctor Martin was the Chief of In-Patient Psychiatry at the same medical center. Based upon a review of medical records, clinical interview, Doctor Donahue's notes, psychological tests and related materials, both individuals stated they found no evidence of a psychosis or delusional thinking in the appellant. Doctor Martin indicated the appellant did not suffer from a "major depressive episode," but had a "mixed personality disorder" which would not impact on his ability to conform his behavior to the law. Doctor Carpenter also

found nothing in the appellant's medical records to support a diagnosis of "a major depressive episode." In his opinion the appellant's medical history contradicts any suggestion that his actions were the result of a psychosis or delusional thinking. Doctor Carpenter thought revenge was the motive for the killing.

The third psychiatrist to testify for the Government was Colonel (Doctor) William H. Grant, a consultant in psychiatry to the Surgeon General of the Air Force. After reviewing the findings of the sanity board, the notes and opinions of Doctors Donahue and Pritchard and other materials relating to the appellant, Doctor Grant was of the opinion there was ". . . not a smidgen of evidence" to indicate a psychosis or delusional thinking. He found nothing to justify a diagnosis of a "severe depression with psychotic features."

As a part of their case in rebuttal the prosecution called Captain (Doctor) Nancy A. Slicner, a Staff Psychologist in the Out-Patient Mental Health Clinic at Wilford Hall. Part of her responsibility is to evaluate psychometric tests given patients meeting a sanity board. One such test is the Minnesota Multaphasic Personality Inventory (MMPI), which is used to identify psychotic disorders. The test has indicators to recognize individuals attempting to fake psychotic behavior. The appellant was given the MMPI twice—once at Little Rock Air Force Base on 16 January 1984 just after his assault on his girl friend and again in February at Wilford Hall after he had killed her. When Doctor Slicner compared the two results the first appeared to be within a normal range while the latter indicated a "thought disorder," but with no accompanying symptoms, After studying the second test and consulting with her colleagues at Wilford Hall, she concluded that the appellant "intentionally over-endorsed" the second test, i.e., attempted to establish a mental condition that was not present. After Doctor Slicner stated she had shown the appel-

lant's MMPI profile to other psychologists at Wilford Hall, the following testimony was admitted over defense objection:

Q: What was the consensus among these people when you showed them this profile?

A: That is was intentionally inflated.

Appellate defense counsel argue that the trial judge erred to the substantial prejudice of the appellant when he allowed such evidence, as it denied the defense the right to cross-examine and confront the psychologists concerning their opinions.

Mil. R. Evid. 703[2] permits an expert to rely on facts and data made known to the expert at or before the hearing, even if such facts or data are neither admitted nor admissible in evidence, so long as they are of a type "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." *See United States v. Benedict*, 20 M.J. 939 (A.F.C.M.R. 1985). We have no hesitation in holding that psychology is a field in which the experience and opinions of others trained in the discipline would be of immeasurable assistance to one attempting to make a diagnosis. *United States v. Arias*, 678 F. 2d 1202 (4th Cir. 1982). What must be remembered is that while expert witnesses may rely on hearsay under Rule 703 to form their opinion, the hearsay itself is not admissible. *United States v. Ramos*, 725 F. 2d 1322 (11th Cir. 1984); *Coulter v. Stewart*, 642 P. 2d 602 (N.M. 1982); *State v. Towne*, 543 A. 2d 1133 (Vt. 1982). As the editorial comment to Mil. R. Evid. 703 stated, ". . . unless care is taken in utilizing Rule 703, parties can 'smuggle' much

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[2] *Rule 703 Bases of Opinion Testimony by Experts*

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert, at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

hearsay evidence into a case, when such evidence is not properly admitted for its truth." *See* Saltzburg, Schinasi and Schlueter, *Military Rules of Evidence Manual*, p. 329 et seq.[3] Accordingly, the trial judge erred when he permitted Doctor Slicner to testify that her colleagues also thought the appellant's second MMPI scores were "intentionally inflated."

However, we do not consider the judge's errant ruling to be of the magnitude that appellate defense counsel suggest. First, the overwhelming portion of Doctor Slicner's testimony concerned *her opinion* that the appellant "intentionally inflated" his MMPI test results; she did not just repeat the opinions of others. *See Mallard v. Colonial Life and Accident*, 326 S.E. 2d 7 (Ga. App. 1985). Second, the prosecutor did not use this one sentence from a transcript of over 1000 pages to convince the members that the appellant was mentally responsible for his actions. *Cf. State v. Towne, supra* (Prosecution "highlighted" the hearsay in its closing argument). And finally, the Government's case as to the appellant's mental state was based on the testimony of three psychiatrists, including two members of the sanity board that examined the appellant, who were in total agreement that the appellant did not suffer a "major depression with psychotic features." Contrasted to this clear statement that the appellant had no mental disorder, was the qualified testimony of two defense psychologists that, "in their opinion, *it [was] more likely than not*, the appellant was unable to conform his behavior to the intent of the law." We are convinced that no reasonable likelihood exists that the improper admission of the hearsay evidence just discussed affected the judgment of the triers of fact.

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[3] A trial judge would be well-advised to give a limiting instruction to the members whenever an expert relies upon information that is not admissible for its truth.

United States v. Colon-Angueria, 16 M.J. 20 (C.M.A. 1983); *United States v. Slovacek*, ____ M.J. ____ (A.F.C.M.R. 1985).

Both Doctor Slicner and Doctor Grant used charts to illustrate portions of their testimony concerning the appellant's mental condition. Trial defense counsel did not object to the use of the charts at the time the witnesses referred to them. In oral argument before us, appellate defense counsel, who represented the appellant below, candidly admitted that the lack of objection at trial when the charts were first used was a planned strategy as it "did not appear that the members were paying any attention to them." This assessment was incorrect for after the members began deliberating, they asked to again see the charts. Over defense objection, the trial judge allowed the members to view them[4]—they were not taken into the deliberation room.

Appellate defense counsel now contend the trial judge committed prejudicial error by permitting the members to review and take notes of charts prepared by government witnesses which highlighted their testimony. Initially, we note the trial defense counsel did not object to the witnesses' using the charts to illustrate their testimony. Further, they had the opportunity to cross-examine the witnesses on the preparation of the charts and what they represented. Additionally, the charts contain no substantive evidence, but were merely visual aids to explain the testimony. In *United States v. Dowen*, 469 F. 2d 314 (10th Cir. 1974), the introduction into the jury room of a blackboard summarizing the indictment was held not to be error. The Seventh Circuit Court of Appeals permitted the jury to use transcripts of tapes of two telephone conversations during its deliberations even though the transcripts were not admitted into evidence. *United States v. Dorn*,

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[4] The members viewed seven charts separately for approximately 15 minutes total.

561 F. 2d 1252 (7th Cir. 1977). Permitting members to review illustrative exhibits used by witnesses as a visual aid is within the sound discretion of the trial judge. Under the facts before us we find no abuse of that discretion.[5] *See generally United States v. Cadena*, 585 F. 2d 1252 (1978).

II

Appellate defense counsel next argue that their client's conviction cannot stand because it was arrived at by less than a unanimous verdict. This argument has been raised and rejected numerous times during appeals by military accused. We also reject this claim of error. *United States v. Seivers*, 9 M.J. 612 (A.C.M.R. 1980); *aff'd* 9 M.J. 397 (C.M.A. 1980); *see United States v. Hutchinson*, 17 M.J. 397 (C.M.A. 1984); *Cert. denied* 105 S. Ct. 384 (1984).

III

Finally, appellate defense counsel assert that the trial judge's instruction on sentence reconsideration was incorrect. We agree, but find this not to be prejudicial error.

During the court's deliberations on sentence, the president requested an instruction on sentence reconsideration (reballoting). The judge, in an out-of-court hearing, went over his proposed instruction with both counsel. The trial defense counsel objected to the proposed instruction, asserting that it was incorrect and arguing, correctly, that the instruction should read that all members must *oppose* reconsidering a death sentence for such reconsideration to

[5] Of course, prudence would suggest that where exhibits are used but not admitted, the trial judge should give a cautionary instruction that the items are not in evidence and are not to be treated as such.

not be required. Over this objection, the trial judge gave the following instruction in part:

> As there are eight members present, five must vote for reconsideration with a view towards increasing the sentence. In voting for reconsideration with a view toward decreasing the sentence, if the accused has been sentenced to confinement at hard labor for life, then six members must vote for such reconsideration, and if the accused has been sentenced to death, then eight members must vote for such reconsideration.

We agree that this instruction was misleading. However, given the mandatory minimum sentence of life imprisonment we conclude that the appellant was not prejudiced. Article 118, U.C.M.J.

First, he received the minimum possible confinement for premeditated murder. Second, while appellate defense counsel argue that the erroneous instruction precluded reconsideration of punishments ancillary to life imprisonment, we think it inconceivable that in light of the facts before them the sentencing authority would impose any ancillary sentence element other than a dishonorable discharge, total forfeitures and reduction to airman basic.

We have carefully examined all aspects of this three week murder trial. We are morally convinced the appellant received a fair trial. It is that to which he is entitled. Accordingly, the findings of guilty and the sentence are

AFFIRMED.

FORAY, Senior Judge and MICHALSKI, Judge, concur.

OFFICIAL

/s/ CHARLES L. WILLE
Charles L. Willie
Captain, USAF
Chief Commissioner

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